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No. 03-652

Supreme Court, U.S.
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In The
Supreme Court of the United States

ANNE M. McNEIL, THOMAS E. WILLIAMS, ROSEANNA SIEBERT, PAUL DiGAETANO and KEVIN J. O'TOOLE,

Petitioners,

v.

THE LEGISLATIVE APPORTIONMENT COMMISSION OF THE STATE OF NEW JERSEY, DEFOREST B. SOARIES, Secretary of State of New Jersey, and JOHN FARMER, Attorney General of New Jersey,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

REPLY TO RESPONDENT'S OPPOSITION

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REPLY TO RESPONDENT'S OPPOSITION

Respondent Commission concedes the within petition raises "an important issue on which the lower courts are not in full agreement." Rb9. Respondent argues the requested writ should not issue because: 1) the New Jersey Supreme Court rested its decision not only on the Supremacy Clause, but also on "two independent and adequate state-law grounds"; and 2) the present case is "a very poor vehicle to address the issue." Rb9.

I. THE NEW JERSEY SUPREME COURT DID NOTPROVIDE THE REQUIRED CLEAR AND PLAIN STATEMENT THAT THE DECISION AT ISSUE RESTED ON INDEPENDENT AND ADEQUATE STATE GROUNDS

The New Jersey Supreme Court did not **rest** its decision on "two independent and adequate state-law grounds." Rb4. Respondent Commission relies on the language of the decision stating "[a]lthough we **rest** our decision on the Supremacy Clause, we nevertheless point to other well-accepted doctrines in our jurisprudence that **would lead** to the same result." (emphasis supplied). *McNeil v. Legislative Apportionment Commission*, 177 N.J. 364, 388, 828 A.2d 840, 854 (2003) (App. 24a). Here the Court "point[ed] to . . . "contemporaneous construction" and "claim preclusion" and noted these "well-accepted [state-law] doctrines" **would lead** to the same result. But the Court did not **rest** its decision on these state-law grounds. Instead, the Court explicitly **rested** the decision on the Supremacy Clause. *Id.*; *see also McNeil*, 177 N.J. 364, 371, 828 A.2d 840, 843-44 (2003) (App. 2-3a). ("The

New Jersey Constitution's political boundary requirement" cannot be enforced "without violating the Supremacy Clause.") The rule of law that decided the case, according to the New Jersey Supreme Court opinion, was the Supremacy Clause.

Where a state court opinion **does** address and resolve a federal question, here the demand for influence districts under the VRA, the "mere possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state-law does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question." *United Air Lines v. Mahim*, 410 U.S. 623, 630-631 (1973); *and see Orr v. Orr*, 440 U.S. 168, 276-77 (1979), and cases cited; *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 242 (1983).

Twenty years ago, this Court, in *Michigan v. Long*, 463 U.S. 1032 (1983), imposed on state courts the obligation to ***clearly*** state their decision **rested** on state-law grounds, if the court wanted to avoid having an ambiguous opinion lead to jurisdiction in this Court. *Michigan* held a state court must provide a "'plain statement' that a decision rests upon adequate and independent state grounds. . . ." *Michigan v. Long*, 463 U.S. at 1042.

The New Jersey Supreme Court failed to provide any plain and clear statement that the Court's decision in this case **rested** on independent and adequate state-law grounds. In fact, nowhere in the opinion did the New Jersey Supreme Court explicitly state the decision **rests** on state-law grounds. Instead, every time the New Jersey Supreme Court discussed the effect of "contemporaneous construction" and/or "claim preclusion" on the Court's

decision the Court used the future tense.[1] In addition to the language quoted above, and relied upon by Respondent, *see McNeil*, *supra*, at 392, 828 A.2d at 857 (App. 29a) ("Application of that doctrine to the present case **would support** the conclusion . . ."); *Id.* at 393, 828 A.2d at 857 (App. 30a) ("In addition to the contemporaneous construction (sic), the doctrine of claim preclusion also **would lead** us. . . ."); *Id.* at 397, 828 A.2d at 860 (App. 36a) ("We also **could preclude** plaintiffs from preceding. . . ."). The future tense indicates that an action is in the future relative to the writer. To argue the Court "**rests**" its decision on these state-law grounds renders this choice of language by the New Jersey Supreme Court meaningless.

Certainly, the Court could have clearly stated the decision rested on state-law grounds. Presumably the New Jersey Supreme Court was aware of this Court's twenty-year old jurisdictional precedent.[2] If these state-law grounds, alone, rendered the New Jersey Constitutional provision unenforceable, the New Jersey Supreme Court had no reason to explicitly rest its decision on the Supremacy Clause, instead of these state-law grounds.

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[1] The future tense employs the helping verbs will or shall with the base form of the verb, e.g. "would lead."

[2] In this context it is worth remembering the obvious: three Justices of the New Jersey Supreme Court dissented, unpersuaded by the majority's view of the impact of these state-law doctrines.

II. THE STATE-LAW GROUNDS DISCUSSED IN THE NEW JERSEY SUPREME COURT OPINION ARE NOT INDEPENDENT AND ARE NOT ADEQUATE

1. The doctrine of contemporaneous construction is not independent or adequate

The New Jersey Supreme Court concluded "[w]hen the decision of the Commission is viewed within the framework of the contemporaneous and practical construction doctrine . . . it becomes clear that to construe strictly the language of Article IV, Section 2, Paragraph 3 would . . . violate Section 2 of the VRA." *McNeil v. Legislative Apportionment Commission*, 177 N.J. 364, 392-93, 828 A.2d at 857 (2003) (App. 30a). This state-law basis is "interwoven with the federal law," *Michigan v. Long*, 463 U.S. at 1040. The opinion demonstrates the Court "felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner that it did." *Michigan v. Long*, *supra*, at 1038, n.4. Contemporaneous construction is not, according to the opinion below, an independent basis.

Nor is contemporaneous construction an adequate ground for the decision. As pointed out by Justice LaVecchia in her cogent dissent in *McNeil*, the doctrine of contemporaneous construction applies, if at all, only when the issue concerns an interpretation of the provision, the meaning of the words, not when the issue is the enforceability of unambiguous language. *McNeil*, 177 N.J. at 405-06, 388, 828 A.2d at 865 (App. 47a) (LaVecchia, J., dissenting).

2. The doctrine of claim preclusion is not adequate in this case

Although the doctrine of claim preclusion may be independent, it is in no way adequate. The challenged Plan was filed on April 11, 2001. *McNeil*, 177 N.J. at 372, 828 A.2d at 844 (App. 3a). The Petitioner's complaint was filed exactly **four weeks** later, on May 9, 2001. *Id.* at 373, 828 A.2d at 845 (App. 5a). It is true that *Page v. Bartels*, 144 F.Supp.2d 346 (D.N.J. 2001), was decided on May 7, 2001, two days before Petitioners filed. But there is considerable doubt the *Page* Court would have accepted jurisdiction of Petitioners' claim. *See Stephenson v. Bartlett*, 180 F.Supp.2d 779 (E.D.N.C. 2001) (remanding to state court a state constitutional challenge to an adopted plan defended by a VRA demand for influence districts). Certainly, if Petitioners filed the complaint on May 6, 2001, three days earlier, claim preclusion would not have thwarted Petitioners' claim. The doctrine does not apply to a second suit involving the same issues and parties instituted while the first action is still pending. *See Kaselaan & D'Angelo Associates, Inc. v. Soffian*, 290 N.J.Super. 293, 297-300, 675 A.2d 705, 707-709 (App. Div. 1995).

In addition, two of the four Petitioners are individual voters, not named as plaintiffs in *Page*. Even the two Petitioners who were nominally in *Page* were there only as part of the "Assembly Republican Majority." It is hard to see how this equitable doctrine applies when Petitioners cannot be said to have neglected their rights, two of the Petitioners were not involved in *Page*, the remaining Petitioners were only nominally in *Page*, and it is unclear the *Page* Court would have accepted jurisdiction.

If claim preclusion, standing alone, provided the deciding rule of law in this case, there was no need for the New Jersey Supreme Court to explicitly rest its decision on the Supremacy Clause. It seems hardly likely the New Jersey Supreme Court would have invoked claim preclusion, since the parties did not brief it,[3] if the Court understood the VRA did not prohibit enforcement of the New Jersey Constitution. Plaintiffs seeking enforcement of a constitutional provision the Court believes should be enforced, are seldom equitably estopped because the complaint, filed within four weeks of the challenged governmental action, comes three days after a different challenge to the same governmental action was dismissed.

Even if claim preclusion is considered an independent and adequate state ground, this Court is not without jurisdiction. Districting is a once a decade process. The challenged decision, without correction, rewrites the New Jersey Constitution, based on a misunderstanding of Federal Law. The decision forever forecloses New Jersey from enforcing the municipal boundary provision adopted by the people of New Jersey as an amendment to New Jersey's Constitution. But a reversal by this Court on the federal question raised will resurrect the municipal boundary provision for 2010, even if the New Jersey Supreme Court rests a future dismissal on claim preclusion.

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[3] *McNeil*, 177 N.J. at 399, 828 A.2d at 861 (App. 38a).

III. THERE ARE NO DEFECTS IN THIS CASE AS A VEHICLE FOR RESOLUTION OF THIS IMPORTANT ISSUE BECAUSE OF THE WAY THE ISSUE WAS RAISED, OR BECAUSE OF THE STATE OF THE RECORD

When a vote dilution claim based on failure to create influence districts is made, either by challengers seeking to invalidate a plan, or by drafters defending a plan against a state constitutional challenge, the claimant must prove the three *Gingles* preconditions. *Thornburg v. Gingles*, 408 U.S. 30, 50-52 (1986). It is simply insignificant whether the claim for VRA compelled influence districts occurs as a defense to a plan, as in this case and *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (N.C. 2003), or is the cornerstone of a challenge to a plan, as in *Parker v. Ohio*, 263 F.Supp.2d 1100 (S.D.Ohio 2003), *summarily affirmed*, ___ U.S ___, 72 USLW 3193, 3339, 3346 (U.S. Ohio Nov. 17, 2003) (No. 03-411) and *Hall v. Virginia*, 276 F.Supp.2d 528 (E.D.Va. 2003). The party demanding influence districts must prove the three *Gingles* preconditions in either case.

Two Federal Courts have recently resolved the question of whether a full trial record is necessary when there is a demand for influence districts. However, the decisions are in conflict. In the Eastern District of Virginia, in *Hall v. Virginia*, 276 F.Supp.2d 528 (E.D.Va. 2003), plaintiffs sought to compel an increase in a specific district's "black total population . . . to approximately 40%" from 33.6% in the challenged plan. This same district had a 39% total black population in the prior plan. *Id.* at 530. The *Hall* Court dismissed the challenge demanding influence districts on a *Rule* 12(b)(6) motion, without a trial record. But just two and one half months after the decision in

Hall, the First Circuit reversed a District Court Judge's 12(b)(6) dismissal of a demand for influence districts identical to the demand in *Hall*. In *Metts v. Murphy*, 347 F.3d 346 (CA1 2003), plaintiffs argued a 26% African-American district would pass muster, but the challenged 21% district would not. The District Court dismissed the complaint on a *Rule* 12(b)(6) motion, as the district court in *Hall* had done. But the First Circuit reversed, with one Judge dissenting.

The first *Gingles* precondition, and arguably the second, does not require a full trial record for determination. The majority in *Parker v. Ohio*, 263 F.Supp.2d 1100 (S.D.Ohio. 2003), *summarily affirmed*, __ U.S. __ (2003), needed no more than is present here to reject an identical claim for influence districts. The New Jersey Supreme Court seized on this "*Parker* demand" to sustain Respondent Commission's admitted failure to abide by the municipal boundary provision of the New Jersey Constitution, explicitly relying on the dissenting view expressed by Judge Gwin in *Parker*. *McNeil v. Legislative Apportionment Commission*, 177 N.J. 364, 387, 828 A.2d at 853 (2003) (App. 22-23a). In *Parker*, however, the majority held that a demand for influence districts, such as the demand raised as a defense by Respondent Commission in this case, failed to state a claim because the undisputed demographics demonstrated plaintiffs were unable to satisfy the first *Gingles* precondition.

This first *Gingles* factor requires the Court to find the minority community "is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles at* 50. The analysis under this precondition only requires a review of the census numbers in the districts created by the plan. It is not until the analysis

turns to the third precondition that the "detailed expert testimony on demographics and voting patterns that is the hallmark of any serious Voting Rights Act case," Rb10, championed by Respondent, comes into play.[4] The issue of influence districts under the VRA can and should be decided without "expert testimony on demographics and voting patterns," as it was in *Parker*, *Hall*, and by the New Jersey Supreme Court here.

Throughout the country, the issue of whether or not influence districts are required by the VRA has divided the lower courts. The demand for influence districts appears both as a challenge to a plan, as in *Parker* and *Hall*, and to defend a plan, as in this case, and in *Stephenson*. The lower courts, and the States, badly need guidance on these demands for influence districts under the VRA.

The facts essential to a determination of Respondent's demand for influence districts in this case are not, and never have been, in dispute. The undisputed population figures for the districts created by the 2001 Plan are part of the Superior Court, Appellate Division opinion. *McNeil v. Legislative Apportionment Commission*, 357 N.J.Super. 74, 81-84, 813 A.2d 1264, 1268-1270 (App. Div. 2003) (App. 78a-81a). The numbers demonstrate that Respondent's 2001 Plan created influence districts out of voters the New Jersey Constitution required be part of one of four majority-minority districts in New Jersey's largest cities. Respondent not only does not dispute the Commission

[4] In any case the *Page* decision contains most of the needed testimony for a majority of the districts at issue. *Page v. Bartels*, 144 F.Supp.2d 346, 353-62 (D.N.J. 2001).

created influence districts as described, Respondent successfully argued below these influence districts were compelled by the VRA. *McNeil v. Legislative Apportionment Commission*, 177 N.J. 364, 384, 828 A.2d at 852 (2003) (App. 19a) ("To now create two districts each in Newark and Jersey City would, in the Commission's view and supported by the record, constitute packing in violation of Section 2 of the VRA.").

This case provides a perfect opportunity to decide the issue. If the New Jersey Supreme Court was correct, *Metts* is correct, and States must yield to a demand for influence districts to avoid a VRA challenge. If, on the other hand, *Parker* and *Hall* are correct, the decision of the New Jersey Supreme Court in this case must be reversed. Reversal communicates to the fifty States that they are free to redistrict without yielding to the demand for influence districts.

CONCLUSION

For all the above reasons the requested Writ of Certiorari should issue.

Respectfully submitted,

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